UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KEVIN P. FITZPATRICK et al.,

Plaintiffs,

-against-

AMERICAN INTERNATIONAL GROUP, INC. et al.,

Defendants.

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MEMORANDUM & ORDER

10 Civ. 142 (MHD)

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MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE:

The parties dispute defendants' invocation of the attorney-client privilege and work-product immunity to protect from production several broad categories of documents. These include principally (1) communications between DLA Piper, the law firm representing defendants prior to and during this lawsuit, and KPMG, the accounting firm hired by DLA Piper to perform certain tasks related to DLA Piper's representation of defendants, and (2) documents created by KPMG and transmitted to DLA Piper in carrying out KPMG's engagement for the law firm. For reasons that briefly follow, we conclude that on the present record defendants have adequately justified protecting those documents.

Background

The setting for this dispute, and for the lawsuit, starts with a March 25, 2009 letter from plaintiff Kevin Fitzpatrick to AIG and AIG Global Real Estate, Inc. ("AIGGRE"), announcing his intention to resign as President and board member of AIGGRE. In explaining the bases for his decision, Fitzpatrick mentioned, among other grievances, the alleged failure of AIG to pay him the full compensation to which he believed he was entitled under his employment contract. That compensation included a share of profits generated through a series of entities -- both partnerships and LLCs -- known generically as Tribeca, Soho, Chelsea and Murray Hill, and referred to as the Tribeca program. The Tribecas and Sohos are limited partners or members in the Murray Hill entities, with AIGGRE serving as general partner or managing member of the Murray Hills. In turn, certain Murray Hill entities have the status of limited partners or members in the Chelsea entities, and AIGGRE is the general partner or managing member in those same partnerships and LLCs. (Letter to the Court from Michael E. Petrella, Esq., 2, Dec. 17, 2010). Fitzpatrick's share of the real estate profits was funneled through these entities and paid out by AIGGRE after release of the funds by AIG.

When defendants received Mr. Fitzpatrick's resignation letter, which accused them of breaching his contract in various ways, they promptly hired the law firm DLA Piper to perform a variety of legal services connected to the contents of plaintiff's letter. Most notably, the law firm was charged with assessing the claims made in the resignation letter and offering legal advice to defendants. (Decl. of Charles P. Scheeler, Esq. ¶ 3, Dec. 8, 2010). In the early stages of the law firm's inquiries, it learned that AIG had discovered "inadequacies in internal control and document procedures" in the Tribeca program, a finding buttressed by a subsequent audit conducted by AIG. (Id. ¶ 4).

The law firm in turn retained KPMG LLP on May 27, 2009 as consultants to assist it in carrying out its assignment. (Id. ¶¶ 5-6). The principal functions to be performed by KPMG involved the calculation of amounts owed to all participants in the Tribeca program, including particularly Mr. Fitzpatrick, and making recommendations to improve controls in the Tribeca program. (Id. ¶ 6 & Ex. C). In the course of carrying out its assigned tasks, KPMG communicated with the law firm and prepared documents that were forwarded to the law firm, and the firm relied on those communications and documents in offering legal advice to the defendants. (Id. ¶ 7).

In early 2010, Fitzpatrick filed the current lawsuit, pursuing claims of contract and fiduciary breach that are comparable to those asserted in his resignation letter.

General Standards

The attorney-client privilege covers confidential communications between counsel and client for the purpose of facilitating the attorney's provision of law-related services to the client. See, e.g., In re County of Erie, 473 F.3d 413, 418 (2d Cir. 2007). The privilege also extends to communications between the attorney and others who are hired by the lawyer to provide professional services that assist the attorney in rendering legal advice to his client. See, e.g., United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Bodega Investments, LLC v. United States, 2009 WL 1456642, *2 (S.D.N.Y. May 14, 2009)(citing cases). Such other professionals whose work may be treated, for privilege purposes, as an extension of the attorney and whose relationship with the lawyer may come within the scope of the privilege include accountants performing work within their areas of expertise that the attorney relies upon in providing his own services. See, e.g., United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Bodega, 2009 WL 1456642 at *8.

As for work-product immunity, it extends to documents prepared because of anticipated litigation. See, e.g., United States v. Adlman, 134 F.3d 1194, 1202-03 (2d Cir. 1998). The test is whether, absent such anticipation of litigation, the document would not have been created or would have been created in substantially different form. Id. at 1202, 1204-05. See, e.g., Bodega, 2009 WL 1456642 at *3, *9-10.

Assessment of Defendants' Showing

The current record adequately establishes circumstances that justify the conclusions that the documents at issue come within the attorney-client privilege and that some are protected by work-product immunity. Briefly stated, there is no question that the plaintiff's resignation letter triggered the conclusion by defendants that they needed independent counsel to provide advice on a host of legal issues potentially implicated by plaintiff's expressed complaints and legal claims, and by the implicit threat in the letter that litigation would ensue. They promptly hired DLA Piper and charged that law firm with the responsibility to assess the Tribeca program to determine how it had been run, what potential exposure there might be to plaintiff and, apparently, what needed to be done proactively to correct problems in the program that had already been noted by AIG in preceding months. Not surprisingly, given the complexity of the program and the financial issues that it posed, the attorneys arranged to hire a sophisticated accounting firm to provide assistance in understanding the detailed workings of the program, to rerun calculations as to what moneys were owed to plaintiff and to the others assertedly entitled to share in covered real-estate profits and to assess the need for operational modifications in the program to fix documented shortcomings. These functions are classic ones for an accounting firm to perform when assisting lawyers who seek to offer advice (1) assessing possible current exposure by the client and (2) suggesting steps to be taken to avoid similar problems in the future.

The documents at issue were created as a part of KPMG's engagement for these purposes. On the face of the record, that firm's activities and the documents that they generated, insofar as communicated to DLA Piper, are therefore presumptively covered by the attorney-client privilege. Moreover, the fact that this arrangement undoubtedly meant that the attorneys were offering advice that involved accounting and financial, as well as legal, considerations does not undermine the applicability of the privilege. As we have previously observed, "[i]n rendering legal services in the setting of a proposed commercial transaction, lawyers are frequently required to address business considerations as part of their role as legal advisor. That dual role is not inconsistent with application of the privilege." Bodega, 2009 1456642 at *4. See County of Erie, 473 F.3d at 420 (quoting United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950)(Wyzanski, J.)).

As for the work-product protection invoked by defendants, Rule 26(b)(3) is available to provide presumptive immunity for any documents created because of anticipated litigation, which in this case ripened into actual litigation in early 2010. To the extent that the documents in question concerned plaintiff, the work-product rule presumptively applies. The resignation letter certainly conveyed a threat of litigation; indeed, it was worded in terms that call to mind a lawyer's shaping of his client's situation into easily parsed legal claims, ready for incorporation in a complaint if the purported offender does not agree to resolve the matter on satisfactory terms. Absent such a threat, even if implicit, it is reasonable to infer that defendants would have kept the calculation of profits interests in-house, as they apparently normally did, and would have seen no need to hire outside counsel to handle this and related issues prompted by Mr. Fitzpatrick's complaints. In short, based on the current record these documents constitute work product.

Why Plaintiff's Counter-Arguments Fail

Plaintiff presses a variety of arguments to overcome the foregoing conclusions. None is merited.

First, Mr. Fitzpatrick argues that KPMG was hired to provide services to him as well as to defendants, and since he was in effect an intended beneficiary of KPMG's labors, he cannot be denied access to the documents created as a result of the KPMG engagement. In so arguing, he cites a series of e-mails referring to an initial meeting that KPMG partners were to have on May 1, 2009 with defendants' counsel and with him. (Letter to the Court from Petrella, 4-5 & Exs. 5 & 6).[1]

The short answer to this line of reasoning is that Mr. Fitzpatrick, as then-President of AIGGRE, was invited to attend that one meeting for the apparent purpose of facilitating

[1] It also appears that plaintiff's then-counsel was planning to be in attendance. (Letter to the Court from Petrella, 4-5 & Ex. 6).

information-gathering by the KPMG partners involved in the project. That would have been his responsibility by virtue of his office, if nothing else, regardless of the precise role envisioned for KPMG. In any event he apparently attended no other meetings with KPMG, and -- consistent with the KPMG engagement letter, which specified that its role was in part a result of anticipated litigation, obviously with Mr. Fitzpatrick (Scheeler Decl. Ex. C, at 2) -- none of the KPMG documents were ever shared with Mr. Fitzpatrick. In short, KPMG operated solely in the service of defendants and their lawyers.

Second, plaintiff argues that work-product protection cannot apply because KPMG was hired for purposes other than litigation, that is, to assist in settlement of the dispute. (Letter to the Court from Petrella, 6). This argument also fails. As noted, KPMG was plainly hired because of the prospect of litigation, and its pre-suit work, even if used in settlement discussions intended to avoid litigation, constituted efforts to prepare for a lawsuit. In short, but for the threat of litigation, KPMG would presumably not have been involved and certainly would not have played the role that it ultimately did fulfill for defendants. Hence, the fact that some of its labors assisted defendants in conducting settlement discussions in an effort to avoid anticipated litigation does not take the documents outside the work-product universe. See, e.g., Boss Mfg. Co. V. Hugo Boss AG, 1999 WL 47324, *5 (S.D.N.Y. Feb. 1, 1999); Int'l Marine Carriers, Inc. v. United States, 1997 WL 160371, *2, *4 (S.D.N.Y. April 4, 1997)(citing cases).[2]

Third, plaintiff asserts that defendants waived any protection because of Mr. Fitzpatrick's attendance at the May 1, 2009 meeting -- or, as counsel more grandiosely puts it, because defendants invited plaintiff "to work alongside Defendants and KPMG." (Letter to the Court from Petrella, 7). There is no evidence that anything of a privileged nature was disclosed to Mr. Fitzpatrick at the meeting or thereafter, and in any event since he was required by his job to cooperate in providing information, his participation in the meeting cannot operate as a waiver. Cf. Fitzpatrick v. American Int'l Group, Inc., 2010 WL 4968181, *7-8 (S.D.N.Y. Nov. 24, 2010).

Plaintiff next tries to invoke the crime/fraud exception to the attorney-client privilege, asserting that defendants misled him if they intended to use KPMG to support their own case preparation. Putting to one side the complete absence of evidence of a fraud[3], we note that the exception applies only to otherwise privileged communications that are intended assist in the perpetration or concealment of a crime or fraud. See, e.g., In re Omnicom Group, Inc. Sec. Litig., 233 F.R.D. 400, 404 (S.D.N.Y. 2006); In re Fresh Del Monte Pineapple Antitrust Litig., 2007 WL 64189, *2 (S.D.N.Y. Jan. 4, 2007), aff'd, (Order of the Court, Nov. 9, 2007) (Berman, J.), aff'd sub nom. American Banana Co., Inc. v. J. Bonafede Co., 2010 WL 4342217 (2d Cir. Nov. 3, 2010). Whether or not defendants misled plaintiff about the intended role of KPMG, plaintiff offers no evidence that the documents generated in connection with the KPMG engagement were intended to further or hide a fraud.

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[2] The cases cited by plaintiff for a contrary proposition do not stand for the principle that plaintiff espouses. Moreover, even if they did, we note that all predate the Second Circuit's definitive ruling as to the standards for work-product protection in Adlman, 134 F.3d at 1202, and, if read to bar immunity for documents prepared to assist in settlement, are inconsistent with the tenor of Adlman.

Fourth, plaintiff asserts that the services provided by KPMG were purely of an accounting nature and therefore not covered by the attorney-client privilege or work-product immunity -- protections that he says are being misleadingly invoked because defendants simply funneled garden-variety accounting work by KPMG through the attorneys. (Letter to the Court from Petrella, 7, 11-

[3] The party invoking the exception must demonstrate probable cause to believe that a crime or fraud has been committed. United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997).

12). This too is misguided. The accounting firm was performing forensic accounting services, which are concededly a part of the function of an accountant, but that does not alter our finding that the functions performed were serving a bona fide need of the attorneys to assist them to undertake their counseling and other lawyerly functions on behalf of defendants. As we have noted, the record as it now stands supports defendants' contention that KPMG was playing precisely that role.

Fifth, plaintiff seeks to invoke the fiduciary exception to the privilege. (Letter to the Court from Petrella, 8-10). This is a repeat of an argument that he ventured on a prior application and that we rejected on the record then before us. Fitzpatrick v. American Int'l Group, Inc., 2010 WL 4968181, *9-11. The record is not materially different now, and hence we reach the same result -- that plaintiff has failed to demonstrate the applicability of the fiduciary exception.

CONCLUSION

For the reasons stated, we conclude that the KPMG documents currently withheld by defendants need not be produced to plaintiffs. We note that plaintiffs are free to re-apply for relief if ongoing discovery materially alters the factual landscape pertinent to our analysis.

Dated: New York, New York
January 28, 2011

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Memorandum and Order have been mailed today to:

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